

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FEDERAL INSURANCE COMPANY,

No. C-12-5084 MMC

Plaintiff,

**AMENDED\***  
**ORDER DISMISSING COMPLAINT**  
**WITHOUT PREJUDICE; DENYING AS**  
**MOOT PLAINTIFF'S MOTION FOR**  
**SUMMARY JUDGMENT**

v.

TOM NEWBY,

Defendant.

Before the Court is plaintiff Federal Insurance Company's ("Federal") "Motion for Summary Judgment," filed November 28, 2012. Defendant Tom Newby ("Newby") has filed opposition, in which he argues Federal's complaint is subject to dismissal. Federal has filed a reply. Having read and considered the parties' respective written submissions, the Court rules as follows.<sup>1</sup>

**BACKGROUND**

The following facts are undisputed.

Federal issued an insurance policy to Newby, insuring his residence in Atherton, California, effective March 1, 2009 to March 1, 2010. (See Tsai Decl. ¶ 2.) On June 15, 2010, Newby reported to Federal that his residence had sustained water damage on or about February 15, 2010. (See id. ¶ 3.) On September 9, 2010, Newby, through his

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<sup>1</sup>By order filed February 12, 2013, the Court took the matters under submission.

\* The sole amendment is to correct a typographical error as to party designation at line 15 above.

1 “representative” Bob Mooring, described the claim to Federal as follows “The water  
2 damage was first noticed when the Newbys discovered water coming through the ceiling of  
3 the play room under the master bedroom bath. Subsequent investigation revealed water  
4 around the tub, inside the Jacuzzi motor area and in the walls.” (See id.; Pl.’s Compendium  
5 of Exhibits, Ex. 2.)

6 Before Federal adjusted the claim, Newby had the master bathroom repaired and  
7 remodeled. (See Tsai Decl. ¶¶ 4-7; Kelly Decl. ¶¶ 4-5.) Total construction costs were  
8 \$501,727.03, of which Newby’s contractor estimated \$221,702.02 was “the cost to repair  
9 the water damage” and the balance of \$280,025.01 was “work solely related to upgrades.”  
10 (See Kelly Decl. ¶ 8.)

11 Federal’s claims adjuster determined Newby was entitled to \$123,156.94, which  
12 amount the adjuster “believe[d] was owed for the water damage,” and Federal paid Newby  
13 that amount. (See Tsai Decl. ¶ 8.) In response, Newby, through counsel, requested an  
14 “appraisal pursuant to the terms of Federal’s policy.” (See id. ¶ 9; Pl.’s Compendium of  
15 Exhibits, Ex. 5.)<sup>2</sup> Federal and Newby subsequently selected appraisers and exchanged  
16 their respective proposed award forms. (See Weisberg Decl. ¶¶ 7, 8-10; Pl.’s Compendium  
17 of Exhibits, Ex. 19.)

18 On October 1, 2012, Federal filed the instant complaint for declaratory relief, in  
19 which it alleges the parties to the appraisal could not reach an “agreement” as to the “scope  
20 of loss to submit to the panel and as to an award form.” (See Compl. ¶ 11.) As a  
21 consequence of said lack of agreement, Federal alleges, “a present and actionable

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22  
23 <sup>2</sup>Neither party has offered a copy of the policy. In his answer, Newby quotes the  
24 subject policy provision as follows: “If you or we fail to agree on the amount of loss, you or  
25 we may demand an appraisal of the loss. Each party will select an appraiser within 20  
26 days after receiving written request from the other. The two appraisers will select a third  
27 appraiser. If they cannot agree on a third appraiser within 15 days, you or we may request  
28 that the selection be made by a judge of a court having jurisdiction. Written agreement  
signed by any two of the three appraisers shall set the amount of the loss. However, the  
maximum amount we will pay for a loss is the applicable amount of coverage even if the  
amount of the loss is determined to be greater by appraisal. Each appraiser will be paid by  
the party selecting the appraiser. Other expenses of the appraisal and the compensation of  
the third appraiser shall be shared equally by you and us. We do not waive our rights  
under the policy by agreeing to an appraisal.” (See Def.’s Answer ¶ 6.)



1 Here, in its complaint, as well as its motion for summary judgment, Federal asserts  
2 that Newby and Federal dispute how the appraisal panel should resolve the parties'  
3 disagreement as to the amount of the loss. Newby has taken the position that the  
4 appraisal panel should determine the amount by starting with what he paid to remodel the  
5 damaged portions of his residence and then subtracting therefrom the value of the work  
6 unrelated to repairing the water damage; his proposed award form reflects said theory by  
7 identifying various items, such as "drywall" and "wood flooring," setting forth his actual cost  
8 to repair or replace those items, and then setting forth the amount of such cost he asserts  
9 is attributable to the water damage. (See Larson Decl. Ex. 1.) Federal has taken the  
10 position that the appraisal panel should determine what it would cost to repair various items  
11 Federal has identified;<sup>3</sup> its proposed award lists items such as "electric outlet[s]" and the  
12 labor required to paint a "door slab" with two coats of paint, and includes blank spaces for  
13 the appraisal panel to fill in with the amount awarded for each such item. (See Pl.'s  
14 Compendium of Exhibits, Ex. 19.)

15 Although the parties have expressed differing views as to how the amount of the  
16 loss should be calculated, those differences amount to what is essentially an evidentiary  
17 matter. Federal has failed to show, and, indeed, does not even allege, that the appraisal  
18 panel has taken any action that suggests the appraisal panel does not understand its  
19 duties under the parties' agreement, or that the appraisal panel, in the absence of  
20 declaratory relief, is likely to act in a way that would violate any law or the terms of the  
21 appraisal clause in the policy.<sup>4</sup> In short, Federal's request for declaratory relief directing  
22 the appraisal panel to conduct the appraisal hearing in a certain manner is, at best,  
23 premature. See Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986)

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24  
25 <sup>3</sup>Although Federal's motion does not expressly state how it determined what items  
26 were damaged, it appears from the record that an "estimate" was provided to Federal by  
27 "the ITS Group" in February 2012. (See Pl.'s Compendium of Exhibits, Ex. 9.)

27 <sup>4</sup>At the time Federal filed its complaint, the appraisal panel had made no procedural  
28 or substantive findings, and thereafter has taken no action other than setting a hearing,  
which it later vacated, and advising the parties the panel would consider at the hearing "the  
issue of value and loss only." (See Larson Decl. Ex. 2.)

1 (“A case is ripe where the essential facts establishing the right to declaratory relief have  
2 already occurred.”).

3 Accordingly, the Court finds Federal has failed to show the existence of a case or  
4 controversy sufficient to warrant issuance of the type of declaratory relief it seeks.

5 Alternatively, even assuming the requisite case or controversy exists, the Court, for  
6 the reasons stated below, declines to exercise its discretion to hear Federal’s complaint.

7 Where an actual controversy exists, a district court is “under no compulsion to  
8 exercise [its] jurisdiction” over the controversy. See Brillhart v. Excess Ins. Co., 316 U.S.  
9 491, 494 (1942). In that regard, the “primary factors for consideration” are “avoid[ing]  
10 needless determination of state law issues,” “discourag[ing] litigants from filing declaratory  
11 actions as a means of forum shopping,” and “avoid[ing] duplicative litigation.” See Huth v.  
12 Hartford Ins. Co., 298 F.3d 800, 803 (9th Cir. 2002).

13 Here, the first factor identified above weighs against the Court’s exercising  
14 jurisdiction, as the sole issues presented by Federal are procedural issues arising in the  
15 context of a pending appraisal proceeding governed by state law. Nothing in the record  
16 suggests the appraisal panel would be unable or unwilling to resolve the issues presented  
17 by the instant complaint, if Federal were to present them to the panel. See Smith v  
18 Lenches, 263 F.3d 972, 977-78 (9th Cir. 2001) (holding where state law issues presented  
19 in federal declaratory relief action will be presented in pending state case, “first factor  
20 weighs decidedly against [party seeking declaratory relief]”).

21 The second factor likewise weighs against the Court’s exercising jurisdiction. As  
22 Newby correctly points out, under California law, an “agreement to conduct an appraisal  
23 contained in a policy of insurance . . . is considered to be an arbitration agreement subject  
24 to [California’s] statutory contractual arbitration law.” See Louise Gardens of Encino  
25 Homeowners Ass’n v. Truck Ins. Exchange, Inc., 82 Cal. App. 4th 648, 658 (2000). Under  
26 California’s statutory contractual arbitration law, an appraisal award is reviewable by a  
27 petition to “confirm, correct or vacate the award,” see Cal. Civ. Proc. Code § 1285, and  
28 judicial review thereunder is “circumscribed,” in that an award may be vacated only if the

petitioner demonstrates one or more specified statutory grounds, see Kacha v. Allstate Ins. Co., 140 Cal. App. 4th 1023, 1031 (2006); Cal. Civ. Proc. Code § 1286.2 (identifying grounds for vacatur of award). Here, rather than present its issues to the appraisal panel in the first instance and later seeking review by a petition to vacate any adverse award the panel may issue, Federal seeks to have a federal district court make, in advance of the appraisal hearing, what is in essence an advisory ruling as to how the panel should conduct certain aspects of the proceeding and how it should set forth its findings in writing.

Lastly, the third factor weighs against the Court's exercising jurisdiction, as resolution in this forum of the issues presented in Federal's complaint would not resolve the parties' dispute as to the amount of loss, and, consequently, would not avoid the need for further litigation before the appraisal panel and, if thereafter desired by either party, before a state court pursuant to § 1285. Cf. Huth, 298 F.3d at 803-04 (holding where controversy could be "disposed of entirely either in state or federal court" third factor was "a wash" and "favored neither party").

Accordingly, Newby's request for dismissal of Federal's complaint will be granted.

### CONCLUSION

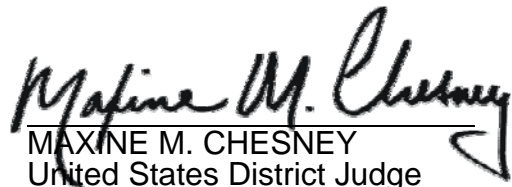
For the reasons stated above:

1. The complaint is hereby DISMISSED without prejudice to Federal's presenting the issues raised therein to the appraisal panel and/or a state court.

2. In light of the dismissal of the complaint, Federal's motion for summary judgment is hereby DENIED as moot.

**IT IS SO ORDERED.**

Dated: March 28, 2013

  
MAXINE M. CHESNEY  
United States District Judge